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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 I Street N.W.  
Washington, D.C. 20536

File: WAC 02 087 53934 Office: CALIFORNIA SERVICE CENTER

Date: **JAN 21 2004**

IN RE: Petitioner:  
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

**INSTRUCTIONS:**

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3) as an unskilled worker. The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, current counsel submits additional evidence and asserts that the petitioner has demonstrated its ability to pay the proffered wage.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) provides in pertinent part:

(2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The sole issue raised on appeal is whether the petitioner has established its ability to pay the proffered wage to the beneficiary. Eligibility in this case rests upon whether the petitioner's ability to pay the wage offered has been established as of the petition's priority date. The priority date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is February 18, 1997. The beneficiary's salary as stated on the labor certification is \$2200 per month or \$26,400 annually. The petitioner is a sole proprietorship.

The petitioner initially submitted insufficient evidence of its ability to pay the proffered wage in the form of a partial copy of the sole proprietor's 1040 U.S. Individual Income Tax Return for the year 2000. This tax return indicates that the petitioner's owner claimed an adjusted gross income of

\$34,159 including a business income of \$37,867 as set forth on Schedule C.

On March 13, 2002, the director requested additional evidence to support the petitioner's ability to pay pursuant to 8 C.F.R. 204.5(g)(2) from the year 1997 to the present. The director instructed the petitioner to submit complete copies if it chose to submit evidence of its ability to pay through federal tax returns. In response, the petitioner sent complete copies of its 1998 through 2001 Form 1040 Individual Income Tax Returns, and a portion of its 1997 Form. The information contained in all of these returns reflected the following:

Year	Gross Receipts	Business Income	Adjusted Gross Income
1997	(approx)\$114,560	\$27,631	
1998	\$141,550	\$25,011	\$23,575
1999	\$164,656	\$41,778	\$38,066
2000	\$175,731	\$37,867	\$34,159
2001	\$189,705	\$39,990	\$35,612

The director denied the petition, finding that the petitioner's adjusted gross income reported in the sole proprietor's individual tax returns did not reflect ability to cover the beneficiary's proffered wage. We concur and would note that even without consideration of the sole proprietor's reasonable living expenses, the adjusted gross income of \$23,575 in 1998, could not cover the beneficiary's offered wage. More importantly, the petitioner failed to submit a complete copy of her 1997 individual tax return, so it cannot be concluded whether she could cover the beneficiary's wage with her adjusted gross income in that year. Pursuant to the regulatory requirements of 8 C.F.R. § 204.5(g)(2), the petitioner must show its ability to pay the offered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence status. As evidence submitted relating to 1997 and 1998 was insufficient to conclude that the petitioner had a continuing ability to meet the beneficiary's proffered wage, we cannot find that the director erred in denying the petition based on the petitioner's ability to pay.

On appeal, counsel submits copies of the petitioner's various financial data including a 2002 profit/loss statement and personal balance sheet, stated to be audited, indicating that the petitioner's net income was approximately \$35,000 as of August 2002. The personal balance sheet indicated that the sole proprietor had approximately \$23,000 in a personal bank account as of August 2002. Counsel offered copies of documentation reflecting that the cash value of an insurance policy was approximately \$2,300 in December 2001. Although this data is certainly relevant as to the petitioner's financial status for those particular time periods, it is noted that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after a beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel also submits various copies of the petitioner's and the sole proprietor's monthly bank statements in support of the argument that the petitioner had sufficient cash flow available to pay the beneficiary's offered wage. There has been no proof presented, however, to show that the 1997 or 1998 balances relevant to the period somehow represent additional funds beyond those

figures presented in the sole proprietor's 1998 tax return.

Taken as a whole, the financial information provided does not support the petitioner's continuing ability to pay the proffered wage beginning from the visa priority date of February 18, 1997. We note that no additional tax return information was provided for the year 1997 other than the portions containing Schedule C as noted above.

In view of the foregoing, we cannot conclude that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the present.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.